Supreme Court, U.S.
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NO. 90-50

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ELLIS GREGORY, JR. and ANTHONY P. NUGENT, JR., Judges,
Petitioners,

v.

JOHN D. ASHCROFT, GOVERNOR OF THE STATE OF MISSOURI,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

BRIEF OF AMICUS CURIAE STATE OF VERMONT OFFICE OF THE COURT ADMINISTRATOR

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INTEREST OF AMICUS CURIAE

The Office of Court Administrator, State of Vermont, is the administrative arm of the Vermont Supreme Court responsible for direction and supervision of all courts within the State. In 1989, the Office of Court Administrator attempted to enforce as to Justice Louis Peck, a duly appointed and confirmed member of the Vermont Supreme Court who had reached the age of 70 years, §35, Chapter II, of the Vermont Constitution which provides:

> All justices of the Supreme Court and judges of all subordinate courts shall be retired at the end of the calendar year in which they attain seventy years of age or at the end of the term of election during which they attain seventy years of age, as the case may be, and shall be pensioned as provided by law. The chief justice may from time to time appoint retired justices and judges to special assignments as permitted under the rules of the Supreme Court.

The United States Equal Employment Opportunity Commission ("EEOC"), proceeding under the Age Discrimination in Employment Act ("ADEA") sought and obtained a permanent injunction against enforcement of this mandatory retirement provision of Vermont's Constitution. EEOC v. Vermont, 717 F.Supp. 261 (D. Vt. 1989). On appeal, the permanent injunction was affirmed in an opinion heavily relied upon by petitioners in the instant case. EEOC v. Vermont, 904 F.2d 794 (2d Cir. 1990) (Pet. Br. pp. 14, 18, 20, 22, 24).

The principal arguments of Vermont's two briefs in that appeal were founded on the requirement, enunciated by this Court, that Congressional legislation

purporting to alter the federal-state balance must contain in the languages of the statute a clear statement of Congressional intent to alter that balance. These arguments were summarily rejected without discussion in the Second Circuit opinion and Vermont remains enjoined from enforcing its Constitution.

Those arguments are now offered to this Court in this amicus curiae brief in the hope and expectation that the Opinion and Order rendered herein will preserve for the citizens of Missouri, Vermont and of other states the rights guaranteed by the Tenth Amendment to the United States Constitution to establish and regulate their respective courts.

SUMMARY OF ARGUMENT

I. The Framers Of The United States Constitution reserved to the states

the right and power to establish their respective courts and the qualifications of their judiciaries. Congress did not make clear in the language of the ADEA that it intended to cover appointed state judges in abrogation of State Constitutions and laws which mandate their retirement and therefore the ADEA must be construed to avoid that result.

II. Application Of the ADEA to State judges would exceed limitations of the United States Constitution of federal actions affecting the States.

ARGUMENT

I. Congress Did Not Make Clear In The Language Of The ADEA That It Intended To Cover Appointed State Judges In Abrogation Of State Constitutions Which Mandate Their Retirement And Therefore The ADEA Must Be Construed To Avoid That Result.

A. Introduction

Just one month before the United States District Court for the Eastern District of Missouri decided the instant case, the United States Supreme Court twice repeated its admonition in Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985), that when Congress wishes to alter the "usual constitutional balance between the States and the Federal Government," it must make its

intention to do so "unmistakably clear in the language of the statute." Will v. Michigan, 491 U.S. ___, 105 L.Ed. 2d 45, 54 (1989), Dellmuth v. Muth, 491 U.S ___, 105 L.Ed. 2d 181, 189.

For two hundred years, that usual constitutional balance preserved for the states the power to prescribe the qualifications of its officers including "important non-elective executive, legislative, and judicial positions." Sugarman v. Dougall, 413 U.S. 634, 647 (1973) (emphasis added). Application of the ADEA to override the State Constitutional mandates retiring Justices based on age substantially alters that balance.

Despite the repeated and recent admonitions by the United States Supreme Court that imperfect confidence regarding

the intent of Congress will not suffice given the special constitutional concerns, Dellmuth, supra, 491 U.S. ____, 105 L.Ed. 2d 190. Petitioners ignore the clear statement requirement and urge that the ADEA is a remedial statute and therefore the ambiguity in its coverage should be broadly construed. (Pet. Br. 15). The District Court in Vermont went further, dispensed with the need for Congressional intent altogether and deferred to agency interpretation. "Even if the language of the statute were vague and the intent of Congress indiscernible, this Court should defer to the EEOC's construction of the ADEA because its construction is reasonable." 717 F.Supp. at 267. Both of these approaches ignore the applicable Constitutional standards of statutory construction mandated by the

opinions of this Court and must be rejected.

B. The Framers Of The Constitution Reserved To The States The Right And Power To Establish Their Respective Courts And The Qualifications Of Their Judiciaries.

The government proposed at the Constitutional Convention of 1787 and adopted by the States "cannot be deemed a national one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several states a residuary and inviolable sovereignty over all other objects." The Federalist, No. 39, at 245 (J. Madison) (Mentor ed. 1961) (original emphasis). The other objects to which the powers left to the several states extend are those "which, in the ordinary course of affairs, concern the

lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." Id., No. 45 at 293 (J. Madison).

By 1789, in enacting the Tenth Amendment, the First Congress made specific that which James Madison had reported:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Consequently, by 1798, this Court, found it

> a self-evident proposition that the several State Legislatures retain all the powers of legislation delegated to them by the State Constitutions, which are not EXPRESSLY taken away by the Constitution of the United States. The establishing courts of justice, the making regulations for the administration of justice, within each state, according to its laws ... appear to me to be the peculiar and exclusive province and duty of the State legislatures.

Calder v. Bull, 3 U.S. (3 Dall.) 386, 387 (1798) (original emphasis).

In 1973, this Court, quoting passim from Oregon v. Mitchell, 400 U.S. 112 (1970), reaffirmed that, as provided in the Tenth Amendment, the States kept for themselves "the power to prescribe the qualifications of its [judicial] officers and the manner in which they shall be chosen." Sugarman v. Dougall, supra, 413 U.S. at 647.

C. Congress Did Not Make Clear In The Language Of The ADEA That It Intended To Shift The Usual Constitutional Balance Regarding State Judiciaries.

To meet the requirements of Atascadero, supra, Congress was thus required to make "unmistakably clear in

the language of the statute" that ADEA was intended to cover appointed judges. The ADEA does not mention judges, but Petitioners nonetheless deduce that appointed judges .. but not elected ones .. are covered.[1] Deductions, however reasonable in usual statutory construction when the Tenth Amendment is not implicated, do not meet the requirement of a clear statement in the words of the statute unless all other alternative deductions are confidently excluded. Dellmuth v. Muth, ___ U.S. ___, 105 L.Ed. 2d 190. This Court there stated:

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[1]Following Garcia v. San Antonio Transit Authority, 469 U.S. 528 (1985), which relies on Congress to protect basic states rights, omission of reference to judges or judiciary may preclude, ipso facto, application of a law to the judicial system. See Point II, infra p. 32.

> Rather, the salient point in our view is that it cannot be said with perfect confidence that Congress in fact intended in 1975 to abrogate sovereign immunity, and imperfect confidence will not suffice given the special constitutional concerns in this area. Cf. Johnson v. Robison, 415 U.S. 361, 373-374 (1974) (federal statute will not be construed to preclude judicial review of constitutional challenges absent clear and convincing evidence of congressional intent).

105 L.Ed. 2d 189-90.

Apparently acknowledging a lack of clarity in the language of ADEA, Petitioners employ a deft analysis of the legislative history of ADEA's possible statutory ancestor which they contend supports the construction of the ADEA they urge upon this Court. (Pet. Br. 18-21). The flaw in their argument is that legislative history, even if informative and relevant, is insufficient to support a construction which would, if accepted, alter the usual constitutional balance

between the States and the Federal Government because Congress has not made its intention to alter that balance unmistakably clear in the language of the statute. Will v. Michigan, supra, 491 U.S. ___, and Dellmuth v. Muth, supra, 491 U.S. ___, 105 L.Ed. 2d 181, 189 (1989), both quoting Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985) (emphasis added). Dellmuth also held that "[l]egislative history generally will be irrelevant to a judicial inquiry" regarding Congressional intent because the intent must be clear in the language of the statute itself. 105 L.Ed. 2d 189.

Perhaps the best evidence that the statutory language is unclear is that after consideration of Petitioners' lengthy statutory exegesis and analysis

of the legislative history, it still cannot be said with any confidence that Congress intended to abrogate State Constitutions mandating retirement of appointed judges at age 70. In Dellmuth, supra, this Court, in an Eleventh Amendment case, required that perfect confidence in the intent of Congress be established before the Federal/State balance will be shifted. Petitioners may argue that the clear statement rule is not applicable because Atascadero, Dellmuth and Will all involve the Eleventh Amendment. But this Court had anticipated that argument in Will[2] and rejected it:

> Atascadero was an Eleventh Amendment

[2]In Will, the State of Michigan was sued in its own Court where the Eleventh Amendment does not apply. Maine v. Thiboutot, 448 U.S. 1, 9 n. 7 (1980). Will, supra, 105 L.Ed. 2d at 53.

> case, but a similar approach is applied in other contexts. Congress should make its intention "clear and manifest" if it intends to preempt the historic powers of the States, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947), or if it intends to impose a condition on the grant of federal moneys, Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 16 (1981); South Dakota v. Dole, 483 U.S. 203, 207 (1987). In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision. United States v. Bass, 404 U.S. 336, 349 (1971).

491 U.S. ____, 105 L.Ed. 2d 54.

The construction of ADEA urged by Petitioners clearly would affect the federal balance in a traditionally sensitive area, because it restricts the power of a State to prescribe qualifications of its officers, including judicial officers. See, Sugarman v. Dougall, supra, 413 U.S. at 647. The

absence of a clear statement deprives this Court of the assurance required by Bass, supra, that Congress faced and intended to bring into issue the critical issue presented in this case, that is, whether Congress intended to override state constitutions, like that of Missouri or Vermont, which mandate retirement of judges at age 70. Indeed, the sequence of separate congressional enactments of which the ADEA is now composed makes it doubtful that any member of Congress intended to abrogate state constitutions or was aware of the risk that EEOC or Petitioners someday might claim such Congressional intent.

When first enacted in 1967, the ADEA did not apply to the states or their political subdivisions at all. In 1974, as a corollary to the extension of the

Fair Labor Standards Act ("FLSA") to the States, Congress also extended the ADEA to the States. The method for both extensions was a definition of state and local government "employees" apparently borrowed from the 1972 extension of Title VII to States in the Equal Employment Opportunity Act of 1972.

Even if Petitioners' construction of those definitions were correct, -- and it is not -- members of Congress would have had no reason to suspect that extension of either FLSA or ADEA would affect state judges because they apparently were excepted from the wage and hour provisions of FLSA as professionals (29 U.S.C. §213(a)) and the ADEA covered only those individuals who were between 40 and 65. Even when the coverage was extended to persons up to age 70 in 1978, no

conflict with state constitutions was evident, perhaps because no state constitution mandated retirement before age 70.

In 1986, effective January 1, 1987, Congress eliminated the age ceiling and extended the ADEA to all covered "employees" private and public, over 40. Only then was the ADEA arguably in conflict with State constitutions and only then would Congress have had reason to consider whether ADEA applied to appointed state judges. A review of the legislative history of the 1986 enactment reveals not a shred of evidence that Congress was even aware of the potential conflict. See 1986 U.S. Code Cong. and Adm. News, pp. 42 and 5628.

Petitioners review the debates between Senators Ervin, Javits and

Williams before enactment of the definitions of "employee" during the 92nd Congres[3] when the issue was discrimination in employment by States, founded not on age but on race, color,

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[3]Because Senators Ervin (N.C.) and Javits (N.Y.) each came from a state which at that time elected its Supreme Court Justices, neither could be relied on to protect the interests of states with appointed justices. In 1972, when the Title VII definitions of state employees was enacted, Vermont's justices were still elected by the legislature, but Vermont's Constitution was changed in 1974 to provide for appointment by the Governor. Ch. II §32, Vermont Constitution; (amendment certified to Secretary of State, October 31, 1974). When the critical definitions were debated by the Senate on February 17, 1972, both of Vermont's senators were absent attending meetings of the Canadian Interparliementary Union. 118 Cong. Rec. 4494 (1972); Legislative History of the Equal Employment Opportunity Act of 1972, pp. 1644-45. In any event, Vermont's Senators had no reason to fear that Title VII's protections against racial, religious or sexual discrimination would conflict with laws or practices regarding composition of Vermont's Courts.

religion, sex or national origin. (Pet. Br. 19-21). Based on that review, Petitioners ask this Court to find in those 1972 debates the clear intent lacking fourteen years later in 1986, when the 99th Congress enacted the first age discrimination amendments arguably to conflict with State constitutions. The ADEA had been applicable to States for 12 years but there had been no occasion for the EEOC or anyone else to urge its application to appointed state judges because there would have been no mandatory retirements of appointed judges under 65. Thus, it is not surprising that the 1986 legislative history is silent on the intent of Congress with respect to mandatory retirement of appointed state judges because there had been no focus on the issue to alert

Senators and Representatives from those few states with appointed judges and mandatory retirement provisions. The remaining Senators and Representatives from states with either elected judges or no mandatory retirement had no reason to be aware of or concerned about the extension of ADEA to appointed state judges over 70. Assurance that Congress "has in fact faced and intended to bring into issue" the critical matters raised in this lawsuit, as required by Will and Bass, is lacking not only in the language of the statute but also the legislative history.

Petitioners have ignored the clear statement cases in their brief and thus misapprehend the significance of the requirement, especially in light of Garcia v. San Antonio Metropolitan

Transit Authority, supra, 469 U.S. 528, and South Carolina v. Baker, 485 U.S. 505 (1988). In overruling National League of Cities v. Ussery, 426 U.S. 833 (1976), this Court determined -- some would say unwisely -- to rely primarily on the States' participation in the national political process, particularly States' representation in Congress. The clear statement requirement is a critical part of the process and lacking in this case.

Petitioners may contend that the requirement for a clear statement, if it exists in a Tenth Amendment context, was met because Congress made clear in the 1974 extension of the ADEA that it intended to cover employees of states. That contention fails to acknowledge both that ambiguity exists in the definition of employee and that different categories

of employees present federal/State constitutional concerns of vastly varying degrees. EEOC v. Wyoming, 460 U.S. 226 (1983), does not hold, as Petitioners suggest (Pet. Br. 13), that extension of ADEA to all state and local employees is consistent with the Tenth Amendment.[4] Decided before this Court overruled the doctrine of immunity articulated in National League of Cities, supra, EEOC v. Wyoming held only that application of the ADEA to a 55 year old game warden was federal intrusion sufficiently less serious than the intrusion in National League of Cities to make it unnecessary

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[4]The term "the Tenth Amendment" is used to encompass any implied constitutional limitation on Congress' authority to regulate state activities whether grounded in the Tenth Amendment itself or in principles of federalism derived generally from the Constitution. South Carolina v. Baker, 485 U.S. 505, 511 n. 4 (1988).

to override Congress' express authority in that case. 460 U.S. at 239.

If Warden Crump had been State Supreme Court Justice Crump, two different and important factors would have been present: first, it seems unlikely that this Court would have found the intrusion "less serious" than the extension of wage and hour laws to public sector employees in National League of Cities; second, the clear statement issue resulting from the ambiguity in the exception for "appointees at the policy-making level," a definition clearly inapplicable to game wardens but at least facially applicable to some state judges or justices, would have led to an opinion undoubtedly different in content and almost certainly different in result.

When Congress extended the ADEA to

the States in 1974, it clearly knew, intended and stated that employees such as game wardens were covered by the Act and that conflicting mandatory retirement laws[5] of the States would be abrogated. By contrast, in 1974, Congress had no reason to expect that the constitutions of Missouri, Vermont and other states, mandating retirement of judges at 70, would be abrogated by the extension because the ADEA at that time clearly did not apply to anyone 65 and over. In 1974, when the definition of state employees in the ADEA was enacted -- and the exclusions from that definition -- only extraordinary and unrealistic

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[5]When extended to the States in 1974, the ADEA protected employees between the age of 40 and 65. Congress undoubtedly was aware that many state and local law enforcement officers were subject to early mandatory requirements, sometimes at ages as young as 50.

prescience by the Congress would have alerted the drafters to the possibility that twelve years later the age ceiling would be lifted and that a small category of judges, -- those who are appointed, not elected -- would be covered.

Petitioners may contend, as EEOC did in the Vermont case, that requiring a clear statement of intent to cover appointed judges would lead to the absurd result that no job categories are covered, since Congress did not explicitly include <u>any</u> particular class of officials when it extended the ADEA to the states and Congress would have had to explicitly list every position in every state government it wished to cover. The argument would be specious. Appointed judges may be the only category where ambiguity exists. Clearly, all executive

branch appointees at the policy making level, made by an executive branch elected official, are excluded from coverage as long as they are not in the civil service. Appointees at the policy-making level made by elected judges within the judicial branch, and by elected legislators within the legislative branch, also would be excluded. It is only because appointed judges serve in a branch of government other than the branch that appointed them that Petitioners are able to make the argument that appointed judges are not excluded from the coverage of ADEA. If, as Petitioners argue, Congress had intended to limit the exclusion to appointees at the policy making level within the executive branch -- or to appointees within the branch of the

elected official who makes the appointment -- it could have and should have made its intention clear within the language of the statute.

Petitioners may argue that EEOC v. Wyoming, supra, decided that ADEA coverage of state and local government employees does not unduly intrude on state sovereignty because states retain other means to accomplish the policy goals imbedded in mandatory requirement programs. Such an argument would read that case too broadly. This Court found that the State of Wyoming claimed "no substantial stake in their retirement policy other than assur[ing] the physical preparedness of Wyoming wardens to perform their duties.'" 460 U.S. at 239. While other means, such as establishing bona fide occupational qualifications or

using case by case adjudication, may be available to accomplish the goal of assuring physical preparedness of game wardens, those means would be less effective for evaluating the continued competency of judges where the subtle factors of judgment, energy, flexibility and temperament, among others, are critical. Individual adjudications of competency necessarily would be attended by unacceptable risks of injury to effective, collegial and efficient functioning of the Courts and to public confidence in the quality of justice. Who would decide when a judge had become incompetent and what are the standards? Should four of Vermont's Supreme Court Justices be expected to testify for or against the fifth? The citizens of Vermont and Missouri, by enacting and

adopting their Constitution, rightfully chose to avoid such damaging spectacles.

Moreover, assuring continued competency of judges does not satisfy the highest aspirations of the citizens of Missouri, Vermont or other states with mandatory retirement provisions concerning their respective judiciaries. Citizens of those states, seeking the higher goal of judicial excellence, may have concluded that such excellence is more likely to be achieved by the periodic infusion of new energy through the appointment of judges who attended law school more recently or who are more responsive to the times. Commentators sometimes refer to the long, distinguished career of Oliver Wendell Holmes, who resigned from this Court at 92 after 30 years service. But, who is

to say that the nation would not have been better served for some of those later years by the earlier appointment of a younger Benjamin Cardozo, who died after only six years on the Court?

The question for this Court, however, is not the wisdom of the choice made by a State concerning its judiciary. Wise or not, the citizens of the States have the right to make judgments about the qualifications of their judges and those of Missouri and Vermont have done so in their Constitutions. There is no clear statement in the language of the ADEA that Congress intended to deprive them of that right. The ADEA must be construed then to avoid abrogating mandatory retirement provisions of State Constitutions.

II. Application Of The ADEA To State Judges Would Exceed Constitutional Limitations On Federal Action Affecting The States.

Even if Congress had stated clearly its intent to override the judgment of the citizens of Missouri or Vermont, as expressed in the mandatory retirement provisions for judges contained in these State Constitutions, the extension of the ADEA to appointed State judges would violate the Tenth Amendment.[6]

Congress based its exercise of legislative power in the ADEA exclusively on the Commerce Clause. 29 U.S. §621(a)(4). Justice Powell, dissenting

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[6]Or the principles of federalism drawn generally from the Constitution. See, p. 23 fn. 4, supra.

in Garcia, supra, noted that the services performed by state and local governments are "remote from any normal concept of interstate commerce," and he was speaking of services like fire prevention, police protection, sanitation and public health. (469 U.S. at 575) By extension of his reasoning, it is very difficult to imagine how the retirement of a Missouri trial judge or a Vermont Supreme Court Justice, for example, has any bearing whatsoever on the flow of goods and services in interstate commerce.

Moreover, the Court in Garcia, although relying for limitations on the exercise of Commerce Clause power initially and primarily on the national political process, also recognized the possibility of other judicially enforced limitations:

> "These cases do not require us to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause."

469 U.S. at 556. As Professor Tribe noted, the real business of preserving federalism ... [is] protecting the structure of state government from federal intrusion." (L. Tribe, American Constitutional Law §5-23, at 396 (2d ed. 1988). If an abrogation of the States' prerogatives in selecting the qualifications of its Constitutional officers, particularly Supreme Court Justices, is not prohibited by the Tenth Amendment, then little state autonomy remains to be exercised because citizen control of who governs is surely more important than where. Compare, Coyle v. Oklahoma, 221 U.S. 559 (1911) (Congress lacks the power to dictate location of a

state capitol).[7]

In South Carolina v. Baker, 485 U.S. 505, 512 (1988), this Court repeated that judicial review of Congressional action remains a possibility after Garcia, but with an emphasis on process:

> Although Garcia left open the possibility that some extraordinary defects in the national political process might render congressional regulation of state activities invalid under the Tenth Amendment, the Court in Garcia had no occasion to identify or define the defects that might lead to such invalidation.

The legislative process which led to the conflict between the purported extension of the ADEA to appointed judges and state constitutional mandatory retirement provisions gave little or no opportunity for protection of the

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[7] See also South Carolina v. Baker, 485 U.S. 505, 528 (Scalia, J., concurring); 485 U.S. at 530 (O'Connor, J., dissenting).

legitimate interests of affected states. Because less than a third of the states have appointed judges of any sort and only a few of those mandate retirement at 70, a small minority can be said to have been "singled out in a way that left [them] politically isolated and powerless." 485 U.S. 513.

Thus, if this Court accepts the interpretation of the ADEA urged by Petitioners, it should also find that the structure of state governments has been violated by that interpretation. Because the legislative process was defective, this Court should act to protect the rights of the citizens of Missouri and Vermont to govern themselves on purely State matters as guaranteed by the Constitutional principles of federalism and declare that the extension of ADEA to

appointed state judges violates the Tenth Amendment.

CONCLUSION

The Decision of the Eighth Circuit should be affirmed in an opinion which reflects the principles of federalism embodied in the United States Constitution.

Respectfully submitted at Burlington, Vermont, this 15th day of February, 1991.

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